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Workers' Compensation

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WORKERS' COMPENSATION

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This survey article will again review changes in Texas Workers' Compensation Law brought about by the Legislature and the appellate courts. Although legislative changes were fewer in 1981 than in previous sessions, the volume of cases in both trial and appellate courts continued to increase.

I. LEGISLATIVE CHANGES

During 1981 the 67th Legislature did not make any extensive changes in the Workers' Compensation Act[1] (the Act) although there were several significant amendments dealing with specific sections.

Preferential Settings—Trial Courts. One new statute, article 2166a, requires "regular and frequent" preferential settings for appeals of final rulings and decisions of the Industrial Accident Board.[2] Workers' compensation cases now will be preceded in order of preference only by: (1) temporary injunctions, (2) criminal actions against defendants who are detained in jail, and (3) election contests and suit under the Texas Election Code. Article 2166a further provides that the trial courts shall observe the preference set out in the statute in ruling on, hearing, and trying matters pending before them.[3]

Statutory Total and Permanent Incapacity—Lifetime Benefits. If an injured worker has sustained any of the following injuries the incapacity shall conclusively be held to be total and permanent:

1. the total and permanent loss of the sight of both eyes;
2. the loss of both feet at or above the ankle;
3. the loss of both hands at or above the wrists;
4. a similar loss of one hand and one foot;
5. an injury to the spine resulting in permanent and complete paralysis of both arms or both legs or of one arm and one leg;
6. an injury to the skull resulting in incurable insanity or imbecility.[4]

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1. TEX. REV. CIV. STAT. ANN. arts. 8206-8309i (Vernon 1967 & Supp. 1982).
2. *Id.* art. 2166a, § 1 (Vernon Supp. 1982).
3. *Id.*
4. *Id.* art. 8306, § 11a (Vernon 1967).

For those injuries occurring *before* June 18, 1981, the injured worker's cash benefit period is limited to 401 weeks.[5] The legislature, however, has now provided lifetime benefits for employees who sustain any of the injuries outlined in section 11a of the Act after June 18, 1981.[6] The new amendments also provide that no attorney's fee may be allowed in cases in which the employee receives lifetime benefits for the injuries outlined in section 11a if the insurance carrier admits liability while the case is pending before the Industrial Accident Board and makes periodic payments.[7] If the insurance carrier contests liability, however, attorney's fees are allowed only by periodic payments and not in a lump sum.[8]

State Employees—Out-of-State Injuries. Article 8309g of the Act provides workers' compensation insurance coverage for state employees.[9] This statute was amended in 1981 to provide workers' compensation coverage for state employees regardless of the state in which they might be hired and regardless of whether or not they may have been injured outside the State of Texas.[10] An employee who elects to pursue remedies provided by the District of Columbia or another state in which an injury occurs is not entitled to benefits under article 8309g.[11]

Voluntary Compensation Benefits—Industrial Accident Board Jurisdiction. The Texas Act does not provide for mandatory coverage by every employer. The law specifically excludes injuries sustained by domestic servants, casual employees engaged in employment incidental to a personal residence, farm laborers, ranch laborers, and the employees of any person, firm, or corporation operating in a steam, electric, street, or interurban railway as a common carrier.[12] Voluntary compensation, however, has been allowed, and during the past session, the legislature amended the Act to provide that claims for compensation benefits under voluntary policies of insurance are now subject to the Industrial Accident Board's jurisdiction.[13] This amendment should eliminate any questions about the administrative handling of voluntary claims.

Fraud Investigation—Attorney General. The Texas Attorney General has authority to conduct investigations dealing with any allegation of fraud on the part of any employer, employee, attorney, person, or facility furnishing medical services, or insurance company or its representative relating to any

5. *Id.* art. 8306, § 10 (Vernon 1967 & Supp. 1982).
6. *Id.* art. 8306, § 10(b) (Vernon Supp. 1982).
7. *Id.* art. 8306, § 10(c).
8. *Id.* art. 8306, § 10(d).
9. *Id.* art. 8309g.
10. *Id.* art. 8309g, § 17. Section 17 was added in 1981 as a new section, and prior case law does not address the question of whether out-of-state employees could recover.
11. *Id.*
12. *Id.* art. 8306, § 2 (Vernon 1967 & Supp. 1982).
13. *Id.* art. 8308, § 18 (Vernon Supp. 1982).

claim.[14] The most recent legislation now allows the attorney general to issue "civil investigative demands" for the production of materials relevant to his investigation.[15] Any person who removes, destroys or alters requested documentary material may be guilty of a class A misdemeanor.[16]

Other amendments to the Act dealt with political subdivisions and state employees.[17] The term "employee" was amended to include volunteer firefighters, policemen, emergency medical personnel and other volunteers who are specifically named by the political subdivision.[18] These persons are now entitled to full medical benefits and the minimum compensation payments provided under the law.[19] In addition, corrective changes were made in article 8309g pertaining to state employees, employees of political subdivisions and highway department employees to make other parts of the Act applicable to the statutory scheme governing benefits for public employees.[20]

II. SUBSTANTIVE LAW

Course of Employment. The Texas Act covers an employee's injury only if the injury is sustained in the course of employment.[21] In order for an employee to show that he sustained an injury in the course of his employment, Texas law requires proof that the injury occurred while the worker was engaged in the furtherance of the employer's affairs or business and that the injury was of a kind and character that had to do with and originated in the employer's work, business, trade, or profession.[22] This past year the Texas Supreme Court upheld a jury finding awarding coverage under the Act in *Deatherage v. International Insurance Co.*[23] That case was brought by the widow of an employee whose body was found amid burned remnants of his trailer on the plant premises. The deceased employee, Deatherage, performed security duty at an asphalt mixing plant, and lived in his own trailer parked on the plant premises. Although the employer did not require Deatherage to live on the premises, he knew, from a prior job Deatherage had performed, that Deatherage would live on the premises. Deatherage had no specific duties to perform and was not required to be at any particular place on the premises while on duty, but was instructed to watch the plant during the hours of darkness. The exact time of death and the duties being performed were not ascertained. The Austin court of civil appeals concluded that there was no evidence to support the jury finding that Deatherage died in the course of employment

14. *Id.* art. 8307, § 9a(e)(1).
15. *Id.* art. 8307, § 9a(e)(3)-(5).
16. *Id.* art. 8307, § 9a(e)(4)(A).
17. *Id.* art. 8309g-8309h.
18. *Id.* art. 8309h, § 1(2) (Vernon Supp. 1982).
19. *Id.*
20. *Id.* art. 8309g, § 15(a).
21. *Id.* art. 8309, § 1 (Vernon 1967).
22. *Id.*
23. 615 S.W.2d 181, 183-84 (Tex. 1981).

and entered judgment that the widow take nothing.[24]

The supreme court reversed, holding that the court of civil appeals erroneously restricted Deatherage's employment to specific duties and fixed hours of employment.[25] Although the evidence showed that Deatherage was paid on the basis of ten hours a day, seven days a week, the court found that the jury could reasonably infer that he was performing security duty for his employer at all times he was on the premises.[26] The court affirmed the rule applied in the case of an "unexplained death" that presumes that an accident arose out of and in the course of employment when an employee is found dead at a place where his duties required him to be, or where he might properly have been in the performance of his duties, during the hours of his work, and there is no evidence that he was not engaged in his employer's business.[27] The rule's application, however, was found unnecessary in *Deatherage* since the jury had found that the deceased employee was injured in the course and scope of his employment.[28]

In *Texas Employers' Insurance Association v. Dryden* the Beaumont court of civil appeals held that the evidence presented in a workers' compensation proceeding by the widow of a field engineer was sufficient to support the jury's finding that the deceased employee had been traveling from one work project to another when he suffered insulin shock, and was involved in a fatal collision.[29] The evidence showed that the deceased worked more than one jobsite at a time and that on the day of his death he had an auto collision while traveling on a road between jobsites. Other evidence supporting the finding showed that the deceased was on twenty-four hour call, as well as working weekends, and was not in the practice of coming home for lunch. Furthermore, a fellow employee had seen the deceased loading the truck, and the deceased had told him that he was going to another job. The court affirmed the finding that the deceased was acting in the course and scope of his employment at the time of his death.[30]

Injuries sustained while going to and from work are generally not compensable.[31] The "access doctrine," however, is a well settled exception to

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24. International Ins. Co. v. Deatherage, 606 S.W.2d 548, 550 (Tex. Civ. App.—Austin 1980).

25. 615 S.W.2d at 183.

26. *Id.*

27. *Id.* This rule was stated in Scott v. Millers Mut. Fire Ins. Co., 524 S.W.2d 285, 288 (Tex. 1974).

28. 615 S.W.2d at 183.

29. 612 S.W.2d 223, 225 (Tex. Civ. App.—Beaumont 1980, no writ).

30. *Id.* at 225.

31. *See* Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974); Shelton v. Standard Ins. Co. 389 S.W.2d 290 (Tex. 1965); Texas Gen. Indem. Co. v. Borrom, 365 S.W.2d 350 (Tex. 1963); Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922); Texas Employers' Ins. Ass'n v. Lee, 596 S.W.2d 942 (Tex. Civ. App.—Waco 1980, no writ); Dishman v. Texas Employers' Ins. Ass'n, 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.); Viney v. Casualty Reciprocal Exch., 82 S.W.2d 1088 (Tex. Civ. App.—Eastland 1935, writ ref'd).

this general rule.[32] Under the access doctrine, an employee is deemed to be in the course of employment if (1) the injury occurs within a reasonable margin of time necessary for passing to and from the place of work both before and after the actual working hours of service, and (2) the injury occurs at a place intended by the employer for use by the employee in passing to and from the actual place of service on premises owned or controlled by the employer, or so closely related to the employer's premises as to be fairly treated as part thereof.[33] In *Texas Employers' Insurance Association v. Dean* the El Paso court of civil appeals held that an employee's injury occurring on an employer owned parking lot located at the place of employment is compensable as though the injury had occurred on the employer's main premises when the employee is authorized to park in the lot and is either going to or from work.[34] In *Dean*, a K-Mart employee was assaulted in the parking lot by a purse snatcher after she left work. After deciding that the access doctrine applied to the case, the court then considered whether the intentional injury exclusion in the Act would preclude recovery.[35] Under this exclusion, an injury is not compensable if it is "caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment."[36] The court applied the "positional risk doctrine" that states that if an employee is assaulted on the premises of the employer when the environment contributed to the risk and when she would not have been assaulted except for her presence on such premises, any injuries sustained by the employee are sustained in the course of employment.[37]

In reviewing the evidence, the court seemed to place particular reliance on the fact that Mrs. Dean was wearing a jacket bearing the store name and that the man who assaulted her had just been in the store where he had shown interest in the money in her cash drawer.[38] The court held that Mrs. Dean's injuries were received in the course of her employment and did not result because of reasons personal to her.[39]

In another case considering scope of employment, the Texas Supreme Court reversed the Amarillo court of appeals' holding in *Biggs v. United States Fire Insurance Co.*[40] The court of civil appeals had denied benefits

32. *See* Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630, 631 (Tex. 1974); Kelty v. Travelers Ins. Co., 391 S.W.2d 558, 562 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

33. *See* Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 111, 246 S.W. 72, 74 (1922); Texas Employers' Ass'n v. Lee 596 S.W.2d 942, 945-46 (Tex. Civ. App.—Waco 1980, no writ).

34. Texas Employers' Ins. Ass'n v. Dean, 604 S.W.2d 346, 349 (Tex. Civ. App.—El Paso 1980, no writ).

35. *Id.* at 349-50.

36. TEX. REV. CIV. STAT. ANN. art, 8309, § 1 (Vernon 1967).

37. 604 S.W.2d at 350.

38. *Id.*

39. *Id.*

40. 611 S.W.2d 624 (Tex. 1981). The supreme court reversed and remanded this case to the intermediate court that then reinstated the jury's finding that the claimant had sustained

to a part time law clerk employed in the law offices of Tom Upchurch, Jr.[41] The clerk was injured while making repairs to an apartment roof owned by an associate in Upchurch's firm. The evidence showed that while employed by Upchurch, Biggs performed a wide variety of duties, consisting primarily of running errands for Upchurch and other employees. Many of these errands were personal errands for Upchurch and his associates, such as changing tires, picking up and delivering packages, watering plants at an associate's house, and picking up rents from an apartment manager of a unit owned by one of the associates. Some evidence also showed that Upchurch was aware of these personal errands. Biggs was never instructed by anyone not to perform these personal errands. Biggs turned in his time for all these personal errands and was paid by the bookkeeper from Tom Upchurch, Jr.'s account.

In reaching its decision, the supreme court reviewed the "temporary direction" exception to the general rule that an injury must be sustained in the course of employment to be compensable.[42] Under this exception, if an employee is directed by his employer to perform a task outside his employer's usual business and is then injured, his injury is deemed to be sustained in the course of his employment.[43] The court recognized that the purpose underlying the enactment of this exception was to eliminate a dilemma that would otherwise face an employee when instructed to perform a task outside his employer's usual business.[44] The employee would either have to obey his employer and lose compensation coverage or disobey and lose his job.[45] Biggs was faced with this very dilemma.

The court of appeals held that there was no evidence that the associate who directed Biggs to repair the roof had authority as Upchurch's agent to direct Biggs' action beyond the scope of Upchurch's affairs or profession.[46] On appeal, Biggs urged that the court had errored in disregarding evidence of the associate's apparent authority from Upchurch to use him for personal errands. Biggs argued that as a result of this authority, he remained in the course of employment under the "temporary direction" exception while performing these errands at the associate's direction. The supreme court agreed with Biggs' argument holding that there was some evidence that the associate's use of Biggs was within the limits of his apparent authority, and that the "temporary direction" exception applied to bring Biggs' injury within the scope of employment with Upchurch.[47]

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injuries in the course of employment. United States Fire Ins. Co. v. Biggs, 614 S.W.2d 496 (Tex. Civ. App.—Amarillo 1981, no writ). For a discussion of the first decision of the Amarillo court of appeals in *Biggs*, see Collins, *Worker's Compensation, Annual Survey of Texas Law*, 35 Sw. L.J. 273, 275-76 (1981).

41. United States Fire Ins. Co. v. Biggs, 601 S.W.2d 132, 137 (Tex. Civ. App.—Amarillo 1980).

42. 611 S.W.2d at 627.

43. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

44. 611 S.W.2d at 628.

45. *Id.*

46. 601 S.W.2d at 135.

47. 611 S.W.2d at 629.

Employee Versus Independent Contractor. Texas workers' compensation law defines an employee as any person in the service of another under any contract of hire, expressed or implied, oral or written.[48] Recently, in *Carnes v. Transport Insurance Co.* the El Paso court of civil appeals affirmed a judgment notwithstanding the verdict for the insurer on the ground that the claimant was not an employee at the time of the accident.[49] Although Carnes, the claimant, was a truck driver for H. G. Courtney, he filed his claim against the lessor of Courtney's truck, the Thrasher Trucking Company located in Monahans, Texas. Before Thrasher actually completed the lease agreement with Courtney, the truck had to pass inspection. In order to be employed by Thrasher and continue as the driver, Carnes was required to complete an employment application, pass a written test and a driving test, have a valid driver's license, and have a valid Department of Transportation physical examination card. On September 27, 1978, Carnes was injured while en route to Monahans, where he anticipated making his first haul the following morning. On the date of the accident, Carnes had not completed the employment application nor taken the required tests. Although Carnes testified that when he started his trip to Monahans on the evening of September 27 he thought he was working for and would be paid by Thrasher, the court held that there was no evidence of any agreement for Thrasher to make payment on that date either to the driver or the owner of the truck.[50] In effect, there was no contract of employment in this case.

Medical Causation and Heart Attacks. Each survey years, the causal link between job conditions and resulting incapacity provides some of the most interesting and challenging cases in the workers' compensation field.[51] The past survey year was no exception. The intensity of the medical causation disputes reached a new zenith in *Schaefer v. Texas Employers' Insurance Association*.[52] In a 5-4 ruling the Texas Supreme Court held there was no evidence of any causal connection between Bobby G. Schaefer's employment as a plumber and his contracting "Group III, mycobacteria intracellularis."[53]

Schaefer had worked as a plumber primarily in rural areas of Nueces County and was required to crawl and tunnel underneath houses to repair

48. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

49. 615 S.W.2d 909, 912 (Tex. Civ. App.—El Paso 1981, no writ).

50. *Id.*

51. *See, e.g.*, Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex. 1976); Employers' Ins. Ass'n v. Wilson, 522 S.W.2d 192 (Tex. 1975); Western Cas. & Sur. Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975); Webb v. Western Cas. & Sur. Co., 517 S.W.2d 529 (Tex. 1974); Olsen v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); Griffin v. Texas Employers' Ins. Ass'n, 450 S.W.2d 59 (Tex. 1969); Insurance Co. of N. America v. Kneten, 440 S.W.2d 52 (Tex. 1969).

52. 612 S.W.2d 199 (Tex. 1980). For a discussion of the court of civil appeals' opinion in *Schaefer*, see Collins, *supra* note 40, at 285-86.

53. 612 S.W.2d at 205. This disease is sometimes referred to as "atypical tuberculosis," a rare disease that attacks lung tissue, scarring the lungs to the point that they cease to function. *Id.* at 200.

or install plumbing. He often worked in soil contaminated with the feces of birds, other fowl, sheep, goats, dogs, cats, and humans. Although the etiology of mycobacteria intracellularis is uncertain, there is a higher incidence of the disease among farmers who work in dirty environments, especially those contaminated by fowl droppings.[54] The plaintiff's case was supported primarily by the testimony of Schaefer's treating physician, and the question before the court was whether his expert's testimony constituted "some evidence" to support the jury's finding that Schaefer was exposed to or contracted the disease while in the course and scope of his employment.

Writing for the majority Justice Denton outlined the Texas Supreme Court's previous rulings in causal connection cases.[55] The court noted that the "no evidence" determination does not turn on any "magic" words or phrases that may or may not be used by the expert.[56] The plaintiff's expert had testified that, in his opinion, based on reasonable medical probability, Schaefer's disease did constitute an "occupational" disease. Despite the physician's testimony, the supreme court ruled that there was a crucial deficiency in the proof of causation; the particular strain of mycobacterium intracellularis from which Schaefer suffered was not identified, the manner in which the disease was transmitted to Schaefer was unknown, and there was no evidence that the bacteria was present in the soil where Schaefer worked or even in Nueces County.[57]

The Texas Supreme Court consistently has ruled that the mere fact that a heart attack or other disabling condition occurs on an employer's premises is not sufficient to support recovery under the workers' compensation law.[58] The heart attack injury and death cases continue to provide a heated battleground between claimants and carriers in the workers' compensation arena. Heart attack "skirmishes" were nowhere better illustrated than in the case of *Western Casualty & Surety Co. v. Dickie*.[59] James Rhabb Dickie suffered a heart attack either before or during a lunch break while on his employer's premises. Dickie was 45 years old and had worked in various phases of the construction trade for about thirty years. On the day the heart attack occurred he was employed as a carpenter on an office building job. The factual testimony indicated that Dickie had been engaged in sawing and putting up sheets of masonite and cedar. Dickie testified that on three different occasions he experienced chest pain

54. *Id.* at 201.

55. *Id.* at 202. *See* Stodghill v. Texas Employers' Ins. Ass'n, 582 S.W.2d 102 (Tex. 1979); Parker v. Mutual Liab. Ins. Co., 440 S.W.2d 43 (Tex. 1969); Insurance Co. of N. America v. Kneten, 440 S.W.2d 52 (Tex. 1969); Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. 1968); Insurance Co. of N. America v. Myers, 411 S.W.2d 710 (Tex. 1966).

56. 612 S.W.2d at 202.

57. *Id.* at 204.

58. Olsen v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972) (no recovery for heart attack absent showing of strain, exertion or shock precipitating heart attack); Insurance Co. of N. America v. Kneten, 440 S.W.2d 52 (Tex. 1969) (heart attack after electric shock compensable); Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W.556 (1916) (scope of act limited to accidental injuries).

59. 609 S.W.2d 874 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

while doing some hand sawing. The insurance carrier contended that there must be a showing that Dickie's heart attack was produced by "strain, over-exertion or shock."[60] The insurance carrier further argued that in this case there was no showing of strain or overexertion causing the heart attack in question.

Citing *Henderson v. Travelers Insurance Co.*[61] the Waco court of civil appeals indicated that, although there must be a showing of "strain or over-exertion" in heart attack cases, no showing of unusual strain or exertion was necessarily required.[62] The court stated that the normal strain or exertion involved in one's work was sufficient if the work was generally physically taxing.[63] In this case Dickie testified that although his work was light compared to other things, it did take strength, exercise, and was physically exertive. The court further pointed out that the worker's treating physician testified that a combination of the work activities, cold temperature, and the worker's pre-existing coronary disease combined to cause the heart attack in question.[64] The appellate court, therefore, ruled that the evidence was legally and factually sufficient to support the jury's verdict in favor of the injured worker.[65] In *Texas General Indemnity Co. v. Dougharty* the court held that there was sufficient evidence to support a jury's finding that a truck driver sustained a ruptured aneurysm while straining to place a tarpaulin over a load of lumber.[66] The employee, Dougharty, was working with the tarpaulin when he felt his neck pop at the base, and thereafter he became dizzy and had a severe headache. Dougharty was hospitalized later that day, and remained under treatment until he died. The treating physician's testimony was allowed to establish the causal connection between the rupture and Dougharty's exertion at work even though the doctor was not certain that the strain at work caused the aneurysm to rupture.[67]

Good Cause. Appellate review of cases involving "good cause" seems to be on the decline, at least compared with past survey years. The Act requires an injured worker to give notice of his injury to his employer within thirty days and to the insurance company within six months.[68] If notice of the injury is not given within those time periods, then the injured worker has the burden of proving "good cause" for the failure to give timely notice.[69] One of the reasons frequently asserted by claimants as "good cause" for late filings is that they relied on representations that everything would

60. *Id.* at 876 (citing Bean v. Hardware Mut. Cas. 349 S.W.2d 284 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.)). The court disagreed with the appellant's interpretation of the *Bean* case, and failed to see its applicability. 609 S.W.2d at 876.
61. 544 S.W.2d 649 (Tex. 1976).
62. 609 S.W.2d at 876.
63. *Id.*
64. *Id.*
65. *Id.*
66. 606 S.W.2d 725, 727 (Tex. Civ. App.—Beaumont 1980, no writ).
67. *Id.*
68. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967).
69. *Id.; see also* Lee v. Houston Fire & Cas. Ins. Corp., 530 S.W.2d 294 (Tex. 1975).

be taken care of made by their employer or the insurance carrier. If such a representation is established in the evidence by the claimant and such evidence is believed by the jury, then it is legally sufficient to justify delay in filing the claim.[70]

The injured worker in *Texas General Indemnity Co. v. Villanueva*[71] was not only successful in establishing that he relied on his employer's representations that everything was taken care of, but was also able to show that he had received a significant letter from the insurance carrier. Following surgery on his knee, Roberto Villanueva received a lump sum payment from the insurance company accompanied by a letter that assured him that his case was still open and requested that he call the company or the board if he required more treatment.[72] The court ruled that this letter, plus the employer's representations constituted sufficient evidence to support the submission of a special issue concerning "good cause," and to uphold the affirmative finding of "good cause" on appeal.[73]

A widow in *Texas Employer's Insurance Association v. Tobias*[74] was not so lucky in asserting a claim for statutory death benefits, despite the fact that the attorney she initially retained subsequently was suspended for two years for professional incompetence in other matters.[75] Mariana Tobias hired Jose Olivares to represent her and her six minor children for workers' compensation death benefits arising out of the death of her husband, Frutosa Tobias. Olivares never did anything toward prosecuting the claim, and Mrs. Tobias sought another lawyer to help her. The State Bar sought to disbar Olivares, who already was suspended from the practice of law for two years. Mrs. Tobias asked the appellate court to create an exception to the general rule that a claim must be filed timely since, she contended, her lawyer was professionally incompetent. The Eastland court rejected this argument stating that there were no jury findings that Olivares was incompetent to handle workers' compensation claims during the period in which he represented Mrs. Tobias.[76] The court observed in passing that Mrs. Tobias was not entirely without a remedy since she could recover the benefits to which she would have been entitled from the attorney, Jose Olivares, and that further, she could seek damages under the Deceptive Trade Practice—Consumer Protection Act.[77]

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70. *See* Hawkins v. Safety Cas. Co., 207 S.W.2d 370 (Tex. 1948).

71. 619 S.W.2d 15 (Tex. Civ. App.—Corpus Christi 1981, no writ).

72. *Id.* at 16. The letter read: "THIS CASE REMAINS OPEN BEFORE THE INDUSTRIAL ACCIDENT BOARD. Please call our office or the Board if your [*sic*] require additional medical treatment or become disabled as a result of this injury." *Id.*

73. *Id.* at 17.

74. 614 S.W.2d 901 (Tex. Civ. App.—Eastland 1981, writ dism'd).

75. The general rule is that the lawyer employed to prosecute a claim for workers' compensation benefits is the agent of the client, and his action or inaction in filing the notice of injury or claim for death benefits is attributable to the client. *See* Texas Employers' Ins. Ass'n v. Wermske, 162 Tex. 540, 548, 349 S.W.2d 90, 95 (Tex. 1961).

76. 614 S.W.2d at 902.

77. *Id.* at 903; TEX. BUS. & COM. CODE ANN. § 17.41-.63 (Vernon Supp. 1982). *See also* Debakey v. Staggs, 612 S.W.2d 924 (Tex. 1981).

Medical Benefits. The Act provides that the injured worker shall be furnished with all medical services reasonably required to cure and relieve him from the effects naturally resulting from an on-the-job injury.[78] Disputes continue to arise in appellate cases indicating that the extent of the carrier's obligation to provide necessary medical services has not been finally decided.

In *Peeples v. Home Indemnity Co.*[79] the employee sustained a knee injury that necessitated surgery. The orthopedic surgeon treated the injured worker for a period of time and then referred him to a psychiatrist for additional care and treatment. At trial, the injured worker offered testimony from the psychiatrist relating to the nature of his treatment and the reasonableness and necessity of such treatment. The insurance carrier objected to the psychiatrist's testimony on the ground that there was no pleading to support its introduction. The trial court agreed with the carrier, and excluded the psychiatrist's diagnosis that flowed from the psychiatric examination.

The appellate court ruled that the injured worker had the right to present evidence as to the reasonableness and necessity of all medical treatment flowing from his injury, including psychiatric testimony.[80] The carrier's argument that there was no pleading to support the admissibility of psychiatric testimony was rejected since there was a pleading which specifically sought recovery of necessary medical and hospital expenses in connection with the worker's injury.[81] The trial court judgment in favor of the insurance carrier on the medical expense issue was reversed and remanded for a new trial.[82]

In another case, Julia O. Sanchez sustained an on-the-job injury but a take-nothing judgment was entered against her since she failed to establish that the compensation benefits she had already received were less than her recovery under the jury's verdict.[83] Sanchez had made a claim for nursing services, and the jury found that such services were reasonably required as a result of her injury. The appellate court observed that the record conclusively established that the insurance company did not, after notice, furnish the nursing services that were reasonably required as a result of her injury.[84] Severing the claim for nursing services from the remainder of the judgment, the appellate court reversed and remanded that part of the judgment disallowing any recovery for nursing services.[85]

Often an injured worker's bill for medical care and treatment will not

78. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Vernon Supp. 1982).
79. 617 S.W.2d 274 (Tex. Civ. App.—San Antonio 1981, no writ).
80. *Id.* at 276.
81. *Id.*
82. *Id.*
83. Sanchez v. Texas Employer's Ins. Ass'n, 618 S.W.2d 837, 842 (Tex. Civ. App.—Amarillo 1981, no writ).
84. *Id.* at 841.
85. *Id.* at 842. Citing TEX. R. CIV. P. 320, the court noted that a claim for nursing services included within a claim for incapacity benefits was a severable issue for which a partial new trial could be granted. *Id.* at 842.

actually make its way into the Industrial Accident Board's file or the insurance carrier's file. These "late" bills must be timely filed with the Industrial Accident Board in order to enforce the carrier's obligation to pay them. This lesson was brought home in *Daniels v. Travelers Insurance Co.*.[86] Daniels sustained an injury on July 31, 1978, and a Board award was entered on December 22, 1978. No appeal was taken, and thus it became a "final award" pursuant to section 5 of article 8307.[87] The final award made no specific mention of any medical expenses; consequently, the insurance carrier refused payment on a bill for medical expenses incurred prior to the date of the final award. Daniels then filed a claim with the Industrial Accident Board for payment of the medical bill in question, and the Board found that the bill was incurred prior to the date of a final award and thus was not timely filed. The trial court granted the insurance carrier's motion for summary judgment but the appellate court ruled that the proper disposition should have been to dismiss the action since the trial court had no jurisdiction.[88] The court ruled that the Industrial Accident Board's disposition was actually a dismissal, on jurisdictional grounds, of a payment claim not timely filed, and since jurisdiction was not timely invoked before the Industrial Accident Board, the trial court had no jurisdiction.[89] Because the trial court had no jurisdiction, the appellate court ruled that it too had no jurisdiction.[90]

Under the rule announced in *Truck Insurance Exchange v. Seelbach*, an insurance company must timely tender surgery to an injured worker or the beneficial effects of surgery are not admissible in a workers' compensation case since the trial court has no power to order or to supervise an operation or determine the advisability of surgery.[91] The *Seelbach* rule was further amplified in *Fidelity and Casualty Co. v. Villarreal*.[92] The court did not allow the insurance carrier's lawyer to cross-examine the injured worker's doctor about the beneficial effects of proposed surgery even though the doctor, on direct examination, had already testified on the need for surgery.[93] This is one of the few areas in Texas practice in which cross-examination is restricted even as to matters that have been brought out during the direct testimony of a witness. Obviously, such testimony can have a devastating effect on a particular claim since, as in *Villarreal*, the injured worker's doctor may well testify that the worker is indeed totally incapacitated at the time of trial even though surgery may well limit or reduce that total incapacity at a later date.

Death benefits. The Act now allows a widow or widower of a deceased

86. 606 S.W.2d 724 (Tex. Civ. App.—Fort Worth 1980, writ dism'd).
87. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1982).
88. 606 S.W.2d at 725.
89. *Id.; see* Holt v. Employers Reinsurance Corp., 393 S.W.2d 329 (Tex. Civ. App.—Houston 1965), *aff'd*, 410 S.W.2d 633 (Tex. 1966).
90. 606 S.W.2d at 725.
91. 339 S.W.2d 521, 525 (Tex. 1960).
92. 618 S.W.2d 103 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).
93. *Id.* at 104.

worker to receive weekly compensation benefits for life.[94] If remarriage occurs, however, the carrier is required only to make a lump sum payment equal to the benefits due for a period of two years.[95] Disputes continue to arise concerning the payment of attorney's fees in a lump sum. This problem arose again in *Texas Employers' Insurance Association v. Critz*.[96] The trial court awarded the surviving widow weekly compensation benefits and granted judgment for a lump sum attorney's fee. The court arrived at the attorney's fee by reference to the "widow's pension tables,"[97] which consider both life expectancy and the expectancy of remarriage. The attorney's fee was calculated at twenty-five percent of the probable future payments, discounted to present value, as a lump sum fee. The insurance carrier contended this liability could not be determined by reference to these tables especially in light of the dual contingencies of both death or remarriage. The Texarkana court of civil appeals approved the use of the widow's pension table.[98] The court further observed that the amount of the attorney's fees in a workers' compensation case is a matter for the trial court to determine without the aid of a jury and the amount of that fee is within the trial court's discretion.[99] The appellate court further observed that the attorney's fee question has been before Texas appellate courts on at least three occasions and each time the award of a lump sum attorney's fee has been approved.[100]

In *Texas General Indemnity Co. v. Dougharty* the Beaumont court of civil appeals expressed "judicial unease" with the doctrine of allowing lump sum attorney's fees based on use of the "widow's pension table."[101] The tables were not entered into evidence, but the trial court took judicial notice of the widow's pension tables and accordingly, allowed the attorney's lump sum fee to be based on the table. Although the appellate court felt discomfort in sustaining lump sum fees based on a table that was not entered into evidence, the court did so in accordance with prior decisions that had allowed such fees.[102] After *Dougharty* was decided, the Beaumont court of appeals was again confronted with the lump sum attorney's fee issue and the widow's pension table in *Texas Employers Insurance As-*

94. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(b)(Vernon Supp. 1982).

95. *Id.*

96. 604 S.W.2d 479 (Tex. Civ. App.—Texarakana 1980, writ ref'd n.r.e.).

97. *Id.* at 484. The Widow's Pension table is a table used by the Industrial Accident Board of Texas to compute the amount of benefits payable to a widow.

98. *Id.* at 485.

99. *Id.*

100. *Id.* (citing Texas Employers Ins. Ass'n v. Motley, 491 S.W.2d 395 (Tex. 1973); Texas Employers Ins. Ass'n v. Miller, 596 S.W.2d 621 (Tex. Civ. App.—Waco 1980, no writ); Texas Employers Ins. Ass'n v. Flores, 564 S.W.2d 831 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Liberty Mut. Ins. Co. v. Ramos, 543 S.W.2d 392 (Tex. Civ. App.—El Paso 1976, no writ)).

101. 606 S.W.2d 725, 728-29 (Tex. Civ. App.—Beaumont 1980, no writ).

102. *Id.* at 729 (citing Texas Employers Ins. Ass'n v. Motley, 491 S.W.2d 395 (Tex. 1973); Texas Employers Ins. Ass'n v. Miller, 596 S.W.2d 621 (Tex. Civ. App.—Waco 1980, no writ); Texas Employers Ins. Ass'n v. Flores, 564 S.W.2d 831 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Liberty Mut. Ins. Co. v. Ramos, 543 S.W.2d 392 (Tex. Civ. App.—El Paso 1976, no writ)). *Id.* at 729.

sociation v. Dryden.[103] Again the appellate court approved the trial court's procedure in taking judicial notice of the widow's pension table, which apparently was not offered in evidence.[104] The better practice would seem to be to obtain a certified copy of the table, tender it to opposing counsel under article 3713,[105] and offer it in evidence at trial. Such a procedure would dispel the objection that the document was not offered in the record.

Third Party Suits. When the actions of a third party other than the employer contribute to the employee's injury, the employee may sue the third party to recover damages in addition to the damages he receives under the Act.[106] During the past survey year one of the most interesting third-party suits was decided by the United States Court of Appeals for the Fifth Circuit in *Hatfield v. Anthony Forest Products Co.*[107] In that case two workers received an electric shock while constructing a metal building for Anthony Forest Products Company. The company contended that the two workers were covered under its workers' compensation insurance policy and thus were prohibited from bringing a negligence action against their employer. The plaintiffs, who operated under the name of a company that, in fact, did not exist, had been hired by Anthony Forest Products to construct a new metal building to be used as a dry kiln. Anthony Forest Products did not withhold any income tax, social security tax, or state unemployment tax for the plaintiffs and their wages were not reflected in the company's payroll records; therefore, they were not considered by the insurance company in calculating the premiums due on the workers' compensation insurance policy. The court of appeals specifically affirmed the lower court's finding that the defendant had purposely engaged in a course of conduct designed to circumvent the application of the workers' compensation laws, and held that such conduct could not defeat the employees' election to resort to a common-law action for damages.[108] The court stated that the employer "cannot complain [of] being left where he chose to place himself by his policy contract."[109]

Limitations problems continue to plague both litigants and appellate courts in dealing with third-party litigation. The legislature, on September 1, 1973, amended section 6a of article 8307 and eliminated the election provisions of that statute.[110] Before this amendment, if the claimant "elected" to proceed against a third party any rights to compensation benefits were waived. The newest amended version of article 8307, section 6a allows both a compensation claim and a third-party suit to be prosecuted

103. 612 S.W.2d 223 (Tex. Civ. App.—Beaumont 1981, no writ).
104. *Id.* at 225.
105. TEX. REV. CIV. STAT. ANN. art. 3713 (Vernon 1969 & Supp. 1982).
106. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1982).
107. 642 F.2d 175 (5th Cir. 1981).
108. *Id.* at 177.
109. *Id.* at 178 (quoting Hartford Accident & Indem. Co. v. Christensen, 149 Tex. 79, 228 S.W.2d 135 (1950)).
110. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1982).

simultaneously.[111] The statute of limitations with respect to filing a claim against a potential third party is also changed by the amendment.[112] In *Allbee v. Day*[113] an unusual twist arose when an injured worker also allegedly sustained a medical malpractice injury. In *Allbee* an on-the-job injury occurred on March 25, 1972, before the 1973 amendment to article 8307, section 6a eliminating election provisions. The alleged medical malpractice occurred on and after October 31, 1974. The plaintiff contended that article 8309, section 3b[114] "saved" the third-party action against the doctor. That statute provides that "no inchoate, vested, matured existing or other rights. . . shall be in any way affected by any of the amendments herein made to the original law. . . ."[115] The San Antonio court of civil appeals had no trouble in characterizing the plaintiff's action for medical malpractice as a third-party claim under article 8307, section 6a.[116] The court ruled, however, that on September 1, 1973, the plaintiff had no right against the defendant doctor that could be characterized as "vested, matured [or] existing."[117] Since the defendant's tortious conduct did not occur until after September 1, 1973, the savings clause was inapplicable even though the on-the-job injury occurred prior to September 1, 1973.

The 1973 amendment to article 8307, section 6a posed another problem for the United States Court of Appeals for the Fifth Circuit in *Shelak v. White Motor Co.*[118] Transport Indemnity Company had paid Shelak for compensation and medical expenses as the result of an on-the-job injury that had occured in 1972. Transport then moved to intervene in Shelak's third-party case. After the third-party case was settled, Transport was awarded its subrogation interest for compensation and medical expenses, but the trial court refused to grant its request for attorney's fees. The court additionally awarded a fee to Shelak's lawyers for their role in protecting Transport's interest. On appeal the Fifth Circuit considered only whether the district court erred in awarding an attorney's fee to Shelak's lawyers out of Transport's recovery, instead of awarding Transport an attorney's fee out of Shelak's lump sum settlement.[119] Transport argued that the lower court erred by applying the current rather than the pre-amendment version of article 8307, section 6a to award attorney's fees. The Fifth Circuit agreed with Transport's argument, finding that the pre-amendment version of article 8307, section 6a was the applicable law.[120]

An attorney's fee dispute arising out of a third-party case was also the primary issue in *Lindamood v. Link-Belt Corp.*[121] The workers' compensa-

111. *Id.*
112. *Id.*
113. 616 S.W.2d 270 (Tex. Civ. App.—San Antonio 1981, no writ).
114. TEX. REV. CIV. STAT. ANN. art. 8309, § 3b (Vernon Supp. 1982).
115. *Id.*
116. 616 S.W.2d at 273.
117. *Id.*
118. 636 F.2d 1069 (5th Cir. 1981).
119. *Id.* at 1072.
120. *Id.*
121. 517 F. Supp. 426 (N.D. Tex. 1981).

tion insurance company intervened in the third-party suit and the plaintiff reached a settlement with the third party. The plaintiff's attorney then sought to recover a fee out of the carrier's subrogation recovery relying on article 8307, section 6a. The court found that the intervenor's counsel actively represented the carrier to the full extent necessary to protect the carrier's subrogation interest and actively participated in obtaining a recovery from a third party.[122] Noting that in this instance "the carrier did not receive a "free ride' from the [p]laintiff's efforts in preparation for trial," the court refused to award the plaintiff's attorney any fee out of the intervenor's recovery under the settlement agreement.[123]

In third-party cases an injured worker's settlement with the third party will not necessarily terminate the litigation. This was exemplified in *Barnes v. Lone Star Steel Co.*[124] Roy Barnes was employed by Seven-O to repair a roof at the Lone Star Steel plant. Barnes was injured when he fell through the roof and he sued Lone Star in a third-party action. Lone Star Steel, in turn, joined Barnes's employer, Seven-O, asserting a contractual right to indemnity.[125]

Barnes had contended that Lone Star was negligent in allowing Seven-O to begin and to continue work on the roof when Lone Star knew that Barnes' employer was not complying with the safety requirements of the contract between Seven-O and Lone Star. A jury returned a verdict in Barnes's favor finding that Lone Star was one hundred percent negligent, and that Barnes and Seven-O were free from any negligence. Barnes later settled with Lone Star which then prosecuted its indemnity action against Seven-O. Lone Star relied on a purchase order requiring Seven-O to be responsible for all damages and to indemnify Lone Star against all damages which arose out of Seven-O's failure to comply with all applicable laws, ordinances and regulations.[126] Seven-O argued that since the jury had found that it was free from any negligent conduct, and since Lone Star was one hundred percent negligent that it was relieved under the express negligence rule from its contractual obligations with Lone Star. The ex-

122. *Id.* at 427. The court specifically listed thirteen points that indicated the intervenor's counsel's active participation in the case, including review, preparation, and filing of Complaint in Intervention and brief in support thereof; filing of Answers to Interrogatories; filing of response to Motion to Compel; inspecting the suspect product; compiling medical expense summary; writing in excess of 150 letters; arranging five depositions and attending various others; consulting with other attorneys; and independently negotiating settlement with the defendant's attorneys. *Id.* at 427-28.

123. *Id.* at 428.

124. 642 F.2d 993 (5th Cir. 1981).

125. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) allowing an indemnity claim by a third party against the employer pursuant to a written indemnity agreement existing prior to the injury.

126. 642 F.2d at 994. The contract read: "THIS PURCHASE ORDER IS CONDITIONED UPON RECEIPT OF SIGNED COPY OF PURCHASE ORDER ACKNOWLEDGEMENT, WHICH INCLUDES GENERAL CONDITIONS COVERING WORK ON PURCHASER'S PREMISES, COPIES ATTACHED. LONE STAR STEEL PLANT RULES AND SAFETY REGULATIONS WILL APPLY TO ALL VENDOR EMPLOYEES. COPY OF PLANT RULES AND SAFETY REQUIREMENTS ARE ATTACHED." *Id.*

press negligence rule provides that an agreement to indemnity another for his own negligence must expressly so state or the agreement is unenforceable.[127] The Fifth Circuit rejected this argument, and held that the jury's findings of negligence did not control Seven-O's contractual undertakings with Lone Star.[128] The court also observed that there was no showing of any independent negligence on the part of Lone Star separate and apart from Seven-O's negligence.[129] Although the court acknowledged that there was no direct Texas precedent, it concluded that a Texas court would be likely to hold that to escape liability under an indemnity agreement an indemnitor, like Seven-O's, must show some type of independent negligence on the part of the indemnitee (Lone Star).[130] Since Lone Star's liability was derived from Seven-O's negligence, the court, therefore, held that Seven-O was not entitled to invoke the express negligence rule, and ruled that Lone Star was entitled to judgment on its indemnity claim against Seven-O.[131]

Suits Against Employers, Nonsubscribers. One of the basic premises underlying workers' compensation law in all states is that an employer who carries workers' compensation insurance (a subscriber) is immune from common law damage suits that might be filed by employees.[132] This immunity was one of the original trade-offs made between the employer and the employee when the original Texas workers' compensation law was enacted in 1913. Theroetically, the employee gives up his right to damage suits against the employer in return for swift, sure compensation payments arising from on-the-job injuries. In turn, the employer is granted immunity from large damage suits and has its liability limited, but does have to provide and pay premiums on a workers' compensation insurance policy to cover its employees for on-the-job injuries.[133]Since the enactment of the original 1913 legislation, a Texas employer has been protected against damage suits for injury or death except in two instances: (1) injuries or death arising out of an intentional tort committed by the employer, and (2) wrongful death actions when an employee's homicide was caused by the willful act or omission or gross negligence of the employer.[134] A number of important cases during the past survey year both expanded and explained the two foregoing exceptions. In *Castleberry v. Goolsby Building Corp.*[135] the Texas Supreme Court confirmed the general rule that the Act does not bar a deceased's cause of action for intentional injuries that sur-

127. *Id.* at 995.
128. *Id.*
129. *Id.*
130. *Id.*
131. 642 F.2d at 996. *See* Eastman Kodak Co. v. Exxon Corp., 603 S.W.2d 208 (Tex. 1980).
132. *See* 2A A. LARSON, WORKMEN'S COMPENSATION § 65.10 (1976). *See also* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
133. *See generally* 14 W. DORSANEO, TEXAS LITIGATION GUIDE § 340.01 (1982).
134. *See* TEX. CONST., art. 16, § 26; TEX. REV. CIV. STAT. ANN. art. 4673 (Vernon 1952) & art. 8306, § 5 (Vernon 1967).
135. 617 S.W.2d 665 (Tex. 1981).

vive to the estate under the general survival statute.[136] Richard Castleberry was killed in an industrial accident while in the course of his employment. The administrator of his estate sued the employer claiming that Castleberry's death was caused by certain "acts and/or omissions to act, which . . . constitute gross, wanton, and willful negligence," "grossly negligent acts," "negligent, or grossly negligent, acts and omissions" and "ordinary or gross negligence."[137] The employer defended on the ground that the administrator, in his pleadings, had failed to state a cause of action for an intentional injury. The trial court granted summary judgment in favor of the employer and the court of civil appeals affirmed.[138] The Texas Supreme Court agreed with the lower court's holding that the administrator's allegations of willful negligence and willful gross negligence were insufficient to give the employer's lawyer fair notice that the cause of action was for an intentional injury.[139] The court further observed that an injury caused by willful negligence or willful "gross" negligence is not an intentional injury sufficient to avoid the effect of the Act.[140]

Cases continue to be litigated concerning whether or not Texas will follow the "dual capacity" exception to the exclusive remedy provisions provided in the workers' compensation statute. Generally, the "dual capacity" doctrine does away with employer immunity if there is a legal relationship with the employee independent of the employer-employee status.[141] In *Mott v. Mitsubishi International Corp.*[142] the deceased employee worked as a battery salesman for Union Carbide Company, and during the course of his employment contracted amyotrophic lateral schlerosis, which allegedly was caused by his handling of defective batteries. The suit was based on a products liability theory, thereby avoiding the immunity granted the employer under the workers' compensation law. The trial court granted summary judgment in favor of the employer, Union Carbide, and the Fifth Circuit affirmed noting that Texas had rejected the dual capacity argument in *Cohn v. Spinks Industries, Inc.*[143]

Another plaintiff sought to recover under the "dual capacity" doctrine in

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136. TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1967).

137. 617 S.W.2d at 666.

138. For the lower court opinion, see Castleberry v. Goolsby Bldg. Corp., 608 S.W.2d 763 (Tex. Civ. App.—Corpus Christi, 1980).

139. 617 S.W.2d at 666.

140. *Id.*

141. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967). The dual capacity doctrine is explained in A. LARSON, 2A WORKMEN'S COMPENSATION LAW § 72.80 (1976). The author states:

> Under this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as an employer.

Id.

142. 636 F.2d 1073 (5th Cir. 1981).

143. *Id.* at 1074. *See* Cohn v. Spinks Indus., Inc., 602 S.W.2d 102 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

an injury context in *Gore v. Amoco Production Co.*[144] Gore was injured when she fell over a roll of carpeting lying in the hallway of her employer's premises during the course of remodeling work. Alleging that the employer was acting in a dual capacity, both as an employer and as an occupier of the premises, the plaintiff sought to circumvent the exclusivity provisions of the Act.[145] The court of civil appeals observed that an employee has no common law right of action to recover damages for injuries sustained in the course of employment unless the employer is properly notified in accordance with the Act when the employment contract is created.[146] In rejecting the plaintiff's arguments that the "dual capacity" doctrine should be followed, the *Cohn* case was again relied on to re-establish the principle that the Act remedies constitute the exclusive remedy that an employee has against his employer.[147]

The difficulties and legal barriers involved in prosecuting a wrongful death action for exemplary damages against a Texas employer are nowhere better illustrated than in the court of civil appeals' opinion in *Missouri Valley, Inc. v. Putman*.[148] Haskell B. Putman, Jr., a construction employee of Missouri Valley, Inc., was engaged in constructing a power plant, and was fatally injured during the course of employment when he fell through an unbarricaded hole in an upper floor of the plant. Putman's widow and beneficiaries received workers' compensation benefits. The wrongful death action was brought by Putman's widow, children and parents to recover exemplary damages from Missouri Valley as authorized by law when an employee's death is caused by a willful act, omission or gross negligence of the employer.[149] Missouri Valley argued that there was no evidence of gross negligence on its part since it had instituted its own safety rules and orders to complement those promulgated by the Occupational Safety and Health Administration and has held weekly safety meetings in order to instill safety consciousness in its employees. The Amarillo court relied on a line of cases going back to 1888[150] in observing that the definition of "gross negligence" constituted in *entire* want of care that would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the persons affected by

144. 606 S.W.2d 289 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

145. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) provides that "[t]he employees of a subscriber . . . shall have no right of action against their employer . . . but such employees and their representatives and beneficiaries shall look for compensation solely to the association as the same is hereinafter provided for."

146. 616 S.W.2d at 290. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).

147. 616 S.W.2d at 290.

148. 604 S.W.2d 545 (Tex. Civ. App.—Amarillo 1980), *rev'd*, 616 S.W.2d 930 (Tex. 1981).

149. *Id.* at 546. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967) (authorizing exemplary damages).

150. The definition of gross negligence was first announced in Missouri Pac. Ry. Co. v. Shuford, 72 Tex. 165, 10 S.W. 408 (1888) and thereafter followed in Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Jones v. Ross, 141 Tex. 415, 173 S.W.2d 1022 (1943); Bennet v. Howard, 141 Tex. 101, 170 S.W.2d 709 (1943).

it.[151] The court concluded that the record did not prove an "entire" want of care because there was some evidence that Missouri Valley had a safety program thereby reflecting at least some care and concern for the safety and welfare of its employees.[152] The court, therefore, held that as a matter of law there was "no evidence" to support the jury findings of gross negligence.[153] On appeal, the Texas Supreme Court held that there was "some" evidence to support the jury's verdict, but reversed and remanded the case to the court of civil appeals for determination of other points of error.[154]

On the same day that Putman was remanded to the Amarillo court of civil appeals, the Texas Supreme Court decided the landmark case of *Burk Royalty Co. v. Walls*.[155] On November 8, 1974, Jeff Walls, an employee of Burk Royalty, was working at an oil well site in Rusk County, Texas. He was a member of a four-man crew pulling wet tubing from an oil well so that the pump at the bottom could be replaced and production reinstated. While Walls was working about twenty-five feet above the derrick floor, pressurized gas escaped causing oil to spew out of the tubing, covering Walls' body with oil. The gas ignited and shot flames to the top of the derrick igniting the oil on Walls' body. He struggled to get out of his safety belt but couldn't. Since there were no fire extinguishers at the well site, the other crew members tried to extinguish the fire on Walls' body by throwing buckets of water at him. The jury found that the safety supervisor for Burk Royalty failed to follow approved safety practices in pulling wet tubing and that such failure constituted gross negligence.[156] Burk Royalty, relying on *Armco Steel*[157] and its progeny, defended on the grounds that there was no evidence of an "entire want of care" amounting to a conscious indifference that would support an award of exemplary damages.

In a scholarly opinion by Justice Spears, the supreme court initially observed that the development of the gross negligence concept in Texas has been somewhat confusing, thus necessitating a careful review of its historical development.[158] The court then proceeded to review the history of gross negligence in three different settings: (1) the Texas Railroad Statute

151. 604 S.W.2d at 547.
152. *Id.* at 548.
153. *Id.*
154. Putman v. Missouri Valley, Inc., 616 S.W.2d 930, 931 (Tex. 1981).
155. 616 S.W.2d 911 (Tex. 1981).
156. 616 S.W.2d at 914. The trial court gave the following instruction accompanying the "gross negligence" special issue:

> You are instructed in connection with the foregoing Special Issue that 'gross negligence' is the exercise of so little care as to justify the belief that such action was a heedless and reckless disregard to the safety of Jeffrey Paul Walls and others.
>
> 'Heedless and reckless disregard' means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it.

Id. at 915.
157. Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964).
158. 616 S.W.2d at 915-16.

period; (2) the workers' compensation cases; and (3) the guest statute.[159] The definition of gross negligence set forth in *Missouri Pacific Railway v. Shuford*[160] was cited as the most representative of the Texas Railroad Statute period.[161] *Shuford* was the case in which the Texas Supreme Court first used the phrase "entire want of care" in conjunction with the gross negligence concept.[162]

The court next examined the gross negligence concept in workers' compensation cases. In the early period from 1913 until around 1914 the court noted that some plaintiffs recovered under both the workers' compensation statute and under a claim for gross negligence.[163] During the same period, the "some care" test surfaced with the Texas appellate courts holding that if there was any act evidencing "some care" that act took the transaction out of the definition of gross negligence.[164] The court also noted that a thorough search of the appellate decisions in Texas revealed that no injured worker had recovered against an employer under the some care test.[165] Analysis of the gross negligence concept within the framework of the "guest statute"[166] prohibiting a guest in a motor vehicle from recovering from the owner or operator of the vehicle unless the accident was intentional on the part of the owner or operator or was caused by his heedlessness or his reckless disregard of the rights of others was the court's next step.[167] After an exhaustive review of the cases the supreme court concluded that although the correct definition of "gross negligence" was set out in the *Shuford* case, the source of confusion stemmed from the application of that definition.[168] The court noted that if a jury finds gross negligence the defendant, on appeal, has the burden of establishing that there was "no evidence" to support the jury's finding.[169] Justice Spears stated that the "some care" test utilized in prior workers' compensation cases improperly shifted the burden to the plaintiff to negate the existence of some care, an almost impossible task since anything might amount to

159. *Id.* at 916-20.
160. 72 Tex. 165, 10 S.W. 408 (1888).
161. 616 S.W.2d at 917.
162. 72 Tex. at 171, 10 S.W. at 411.
163. 616 S.W.2d at 918.
164. *See* Magnolia Petroleum Co. v. Ford, 14 S.W.2d 97, 101 (Tex. Civ. App.—Eastland 1929), *writ ref'd per curiam*, 118 Tex. 461, 17 S.W.2d 36 (1929).
165. 616 S.W.2d at 919. The court specifically listed Ballenger v. Mobil Oil Co., 488 F.2d 707 (5th Cir. 1974); Woolard v. Mobil Pipeline Co., 479 F.2d 557 (5th Cir. 1973); Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Missouri Valley, Inc. v. Putman, 604 S.W.2d 545 (Tex. Civ. App.—Amarillo 1980), *rev'd*, 616 S.W.2d 930 (Tex. 1981); Delgadilio v. Tex-Con Util. Contractors, Inc., 526 S.W.2d 208 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Thomas v. T.C. Bateson Co., 437 S.W.2d 386 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.); Stephens v. Dunn, 417 S.W.2d 608 (Tex. Civ. App.—Tyler 1967, no writ); LeJeune v. Gulf States Utils. Co., 410 S.W.2d 44 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); Loyd Elec. Co. v. DeHoyos, 409 S.W.2d 893 (Tex. Civ. App.—San Antonio 1966, writ ref'd); Armstrong v. Texas Power & Light, 399 S.W.2d 922 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).
166. TEX. REV. CIV. STAT. ANN. art. 6710b (Vernon 1967).
167. 616 S.W.2d at 919-20.
168. *Id.* at 920.
169. *Id.* at 920-21.

some care.[170] The court went on to conclude that what converted ordinary negligence into gross negligence was the mental state of the defendant.[171] The plaintiff must show that the defendant was consciously indifferent to his rights, welfare, and safety and that the defendant knew about the peril, but his acts or omissions demonstrated that he did not care.[172] Finally, the court held that "[n]o justification exists for having a different standard for reviewing gross negligence findings in employer cases than in other type cases," and accordingly, it disapproved the use of the "some care" test in determining legal sufficiency points.[173]

In an unusual fact situation from a procedural standpoint, wrongful death beneficiaries were prevented from recovering against an employer in *Puga v. Donna Fruit Co.*[174] The surviving beneficiaries of Juan Torrez sought to recover in a statutory "wrongful death action"[175] against the Donna Fruit Company, allegedly Torrez's employer. The Industrial Accident Board entered an order stating that the evidence submitted failed to establish that the decedent was an employee of Donna Fruit Company at the time of his demise.

Prior to the ruling of the Industrial Accident Board the beneficiaries filed their damage suit in state district court. Donna Fruit Company moved for and was granted dismissal and summary judgment. Because no appeal was taken from the Board award and no new independent theories of recovery were submitted at the trial court level, the trial court's order for summary judgment was affirmed.[176] *Puga* apparently stands for the rather unusual proposition that the employer cannot be sued in a separate action but only by appealing from a negative award of the Industrial Accident Board, even though the Industrial Accident Board may have found that an employee was not employed by a particular employer. It should be noted that the Texas Supreme Court has granted the writ of error in this case.[177]

Wrongful Discharge. An injured worker may file suit against an employer who discharges or discriminates against him for filing a compensation

170. *Id.* at 921.

171. *Id.* at 922.

172. *Id.*

173. *Id.* The court specifically overruled the "some care" test and Texas cases applying it. *See, e.g.*, Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964); Missouri Valley, Inc. v. Putman, 604 S.W.2d 545 (Tex. Civ. App.—Amarillo 1980), *rev'd*, 616 S.W.2d 930 (Tex. 1981); Delgadilio v. Tex-Con Util. Contractors, Inc., 526 S.W.2d 208 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Thomas v. T.C. Bateson Co., 437 S.W.2d 386 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.); Stephens v. Dunn, 417 S.W.2d 608 (Tex. Civ. App.—Tyler 1967, no writ); LeJeune v. Gulf States Utils. Co., 410 S.W.2d 44 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); Loyd Elec. Co. v. DeHoyos, 409 S.W.2d 893 (Tex. Civ. App.—San Antonio 1966, writ ref'd); Armstrong v. Texas Power & Light, 399 S.W.2d 922 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

174. 616 S.W.2d 666 (Tex. Civ. App.—Corpus Christi 1981, writ granted).

175. The action was brought pursuant to TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1982).

176. 616 S.W.2d at 667.

177. 25 Tex. Sup. Ct. J. 14 (Oct. 14, 1981).

claim, hiring a lawyer or instituting any proceedings under the Act.[178] A problem sometimes arises in these suits when the employee is also covered by the terms of a collective bargaining agreement that establishes a grievance procedure in the event of a discharge or other disciplinary action. These issues were illustrated in *Hughes Tool Co. v. Richards*.[179] Willie D. Richards was injured on the job and went to the company clinic. After heated words were spoken, Richards was suspended. The employer and union later conducted a hearing, and Richards' suspension was converted to a discharge for just cause. An additional review before an employer representative again upheld the discharge. No additional action was taken by the union or Richards pursuant to the grievance procedure. Richards then filed a lawsuit against his employer pursuant to article 8307c.[180] The trial court entered judgment for Richards, and the employer appealed asserting Richards's claim was barred by the final adverse determination regarding his discharge pursuant to the contractual grievance procedure established between his union and employer. The court of civil appeals noted that The Texas Supreme Court recently had held in *Carnation Co. v. Borner*[181] that an employee could pursue his wrongful discharge claim if no resolution was made during the grievance process.[182] The court in *Richards* held that one who *elects* to proceed through a grievance procedure provided in the contract between his union and his employer may not then file suit under article 8307c after a "final settlement or determination" has been made following a grievance hearing pursuant to the employment contract.[183] In addition, the court stated that the employee must choose, before a final settlement of the grievance, whether he wishes to file suit under article 8307c or proceed under the employment contract.[184] The court noted that Richards had taken no further action in the grievance process and the matter was not submitted to final arbitration which was the final step under the contract between the union and the employer.[185] Nevertheless, the court of civil appeals concluded that Richards had reached a final settlement and thus was precluded from filing suit.[186] The Texas Supreme Court, however, in a per curiam opinion reversed, holding that "only the first step" of the grievance procedure was actually followed

178. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1982).

179. 610 S.W.2d 232 (Tex. Civ. App.—Houston [14th Dist.] 1980), *rev'd per curiam*, 615 S.W.2d 196 (Tex. 1981).

180. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1982) provides that:

> no person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

181. 610 S.W.2d 450 (Tex. 1980).

182. 610 S.W.2d at 234.

183. *Id.* at 235. The court limited its holding to those situations in which the union has not breached its duty of fair representation. *Id. See* Thompson v. Monsanto Co., 559 S.W.2d 873, 875 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

184. 610 S.W.2d at 235.

185. *Id.*

186. *Id.*

in the *Richards* case, and since no "final determination" was reached and Richards was not barred from suing his employer for wrongful discharge.[187]

The holding of the court of civil appeals in *Richards* illustrates the problems that can arise when an appellate court writes an "election" procedure into the statute even though it is unlikely that such a procedure was intended by the legislature. Nothing in the language of article 8307c suggests that the employee is put to any kind of election or is forced to give up any existing rights which he may hold under a collective bargaining contract. Part of the fallacy involved in the court of civil appeals' reasoning in *Richards* centers around the union decision not to proceed to further stages in the grievance process. A union may decide not to proceed further with the matter for reasons separate and apart from the merits of the employee's grievance. The union may be considering other interests of members of the bargaining unit in addition to the merits of the individual grievance. A discharged employee may well have a meritorious claim under the collective bargaining agreement even though his union chooses not to pursue his grievance to a "final settlement." Any forced "election" of remedies puts a very strenuous burden on the discharged worker who must decide whether to "elect" to proceed under the collective bargaining contract or to proceed with a suit for wrongful discharge under article 8307c. Considering the current state of the law in this area it is doubtful that even knowledgeable lawyers would relish the task of making the decision.

In *Spainhouer v. Western Electric Co.*[188] the Texas Supreme Court again addressed the issue of whether an injured worker was barred from suing her employer after having filed a grievance under the collective bargaining agreement with her employer. Anna Spainhouer was a memmer of the Communications Workers of America and was discharged following an on-the-job injury. The collective bargaining agreement provided for five steps in a grievance situation to be followed by binding arbitration at the option of either party. After the fifth step had been completed in Spainhouer's case, the local union submitted the matter to the district office of the international union that declined to ask for arbitration. Spainhouer then sued Western Electric Company, Inc., pursuant to article 8307c. The supreme court held that there was no "final determination" in this case since it had not been submitted to arbitration, and there had been no ruling by the arbitrator.[189] An interesting point was raised by the employer who contended that section 301(a) of the Labor-Management Relations Act[190] preempted any action under article 8307c. The supreme court

187. 615 S.W.2d 196, 197 (Tex. 1981).
188. 615 S.W.2d 190 (Tex. 1981).
189. *Id.* at 191.
190. The Labor-Management Relations statute provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . *may* be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185 (1970) (emphasis added).

declined to rule on that point, however, since there were no pleadings or evidence to raise the issue.[191]

In *Deford Lumber Co. v. Roys*[192] a discharged worker sued his employer on the theory that he was wrongfully discharged solely because he filed a workers' compensation claim and had hired an attorney to represent him. The Dallas court of civil appeals ruled that no direct evidence was introduced to prove the fact that the worker was discharged solely because he filed a claim and hired an attorney.[193] The court noted that the worker's own testimony that he was fired without a reason, that he was denied insurance benefits, that his insurance costs would be $15.00 a month higher, that at his age it was difficult to get work, and that he did not think "that's the way to do a person" constituted no evidence of wrongful discharge under the Act.[194]

A jury finding in favor of an injured worker in a wrongful discharge action was set aside in *Douglas v. Levingston Shipbuilding Co.* because of a misrepresentation made by the worker in his application for employment.[195] Prior to his employment with Levingston, Douglas was employed by Drilco where he had sustained an injury to his hand. When Levingston learned that Douglas had filed a claim for workers' compensation against Drilco, it fired Douglas. Douglas had not disclosed to Levingston that he was previously employed by Drilco or that he had ever filed a claim for workers' compensation benefits. Douglas sued Levingston for wrongful discharge and Levingston defended on the ground that Douglas was terminated solely because he had falsified his application for employment. In affirming summary judgment in favor of the employer the court of civil appeals noted Douglas had agreed that Levingston could terminate his employment in the event he made false representations.[196] The court, therefore, held Douglas was estopped by his contract of employment from taking the position that his discharge was wrongful.[197]

Industrial Accident Board Procedures. Following a settlement or other disposition of a claim for an on-the-job injury, article 8306, section 12d of the Act allows an injured worker to petition the Industrial Accident Board for additional compensation when there has been a change in the employee's physical condition.[198] The Texas Supreme Court considered an employee's claim of changed condition in *Mendoza v. Fidelity & Guaranty In-*

191. 615 S.W.2d at 191.

192. 615 S.W.2d 235 (Tex. Civ. App.—Dallas 1981, no writ).

193. *Id.* at 237.

194. *Id.*

195. 617 S.W.2d 718 (Tex. Civ. App.—Beaumont 1979, no writ).

196. The employment application provided that "[t]he applicant in making application for employment understands and agrees . . . that any misrepresentation made by him in this application will be sufficient cause for cancellation of the application and/or for separation from Company's service if he has been employed." The applicant, by signature, authorized full investigation of the contents of the application. *Id.* at 719.

197. *Id.* at 720.

198. TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (Vernon 1967).

surance Underwriters, Inc.[199] Celedonio R. Mendoza was injured on the job in January of 1976 following which the Industrial Accident Board entered a compensation award in November of 1976 for approximately $2,000.00. This award was not appealed and became final. Shortly thereafter Mendoza again sought medical treatment for new physical complications, and filed a claim with the Industrial Accident Board to modify the previous award on the basis of a subsequent change in his physical condition. The Board refused to modify its earlier award, and Mendoza filed suit in district court. The jury returned a verdict in Mendoza's favor, and the insurance carrier appealed. The insurer claimed that Mendoza's testimony that he was unable to work prior to the Industrial Accident Board award of November 30, 1976, was a judicial admission of total disability at that time thereby precluding a further change in his work capacity. The supreme court affirmed the trial court finding, concluding that although Mendoza's trial testimony constituted a quasi-admission, it was not a judicial admission.[200] The Court reasoned that because Mendoza's testimony was essentially the testimony of a lay witness, it could not be conclusive on the issue of his physical condition.[201]

The Workers' Compensation Act requires certain steps to establish jurisdiction.[202] One of these steps is that the proper insurance company must have notice of proceedings before the Board, and if the insurance company is not a party to the proceedings, then the Board is without jurisdiction to enter a valid and enforceable award.[203] Such an instance arose in the case of *Owens v. Travelers Insurance Co.*[204] In May of 1976 Charlie Owens was injured in the course and scope of his employment for Swifty Systems, Inc. Some confusion about the proper insurance carrier for Owens' employer existed. Owens filed an amended notice of injury naming the insurance carrier as "Travelers Insurance Company and/or Travelers Indemnity Company of Rhode Island." As it turned out, the Industrial Accident Board by mistake rendered its award against the Travelers Insurance Company rather than the Travelers Indemnity Company of Rhode Island, the actual insurer at the time of Owens' accident. Owens then sued Travelers Insurance Company seeking to enforce the Board award. Travelers argued that since it was not a party to the proceedings before the Industrial Accident Board and had no notice of any hearing that the Industrial Accident Board was without jurisdiction to enter an award against it, and therefore the trial court likewise lacked jurisdiction to hear Owens' appeal. The trial court dismissed with prejudice Owens' action. The Amarillo court of civil appeals agreed with the trial court's acceptance of Travelers'

199. 606 S.W.2d 692 (Tex. 1980).
200. *Id.* at 695.
201. *Id.*
202. Although not technically "jurisdictional" TEX. REV. CIV. STAT. ANN. art. 8307 (Vernon 1967) sets forth several requirements including notice to all parties, the right to be heard, a quorum of the board to be present.
203. *See* Carpenter v. Gulf Ins. Co., 515 S.W.2d 60, 62 (Tex. Civ. App.—San Antonio 1976, no writ).
204. 607 S.W.2d 634 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

argument stating that when the Board was without jurisdiction to render a valid and enforceable award against the Travelers Insurance Company, the court was also without jurisdiction to mature that award.[205]

Article 8306, section 12d generally empowers the Industrial Accident Board to review and modify any order previously made that was erroneously based upon fraud, mistake, or when conditions have subsequently changed.[206] This statute was the subject of another appellate opinion in *Anderson v. New York Underwriters Insurance Co.*[207] In *Anderson* the Industrial Accident Board declined to change an earlier final Board award denying Melba Anderson's claim for compensation benefits. The Board, on June 26, 1978, had refused to find that the claimant sustained a compensable injury in the course of employment. No notice of appeal was given in that case. Anderson filed a motion for a review of the Board's June 1978 award, and at a second hearing the Board specifically found that there was no mistake made as contemplated by article 8306, section 12d. The Board, therefore, declined to change its earlier award. On appeal, the trial court granted summary judgment against Anderson. The court of civil appeals affirmed, noting that although the trial court may have had jurisdiction to entertain an appeal from the Board's decision, there was no evidence in the record that would justify a finding of mistake.[208] The court stated that article 8306, section 12d requires a mistake of fact as to actual injuries received by the claimant whether made by the employee, the insurer or the Board itself, irrespective and independent of any issue of fraud.[209] Further the court found that the only kind of "mistake" that Anderson had alleged was that the Board was mistaken in "judgment" in denying her claim, and the court stated that the remedy for this type of mistake was to perfect an appeal to the proper court and not a review by the Industrial Accident Board under article 8306, section 12d.[210]

Suits to Enforce Compromise Settlement Agreements. In *Home Indemnity Co. v. Rios* the Austin court of civil appeals reversed a trial court's award of an attorney's fee and penalty under article 8307, sections 5 and 5a[211] in a suit to enforce a compromise settlement agreement.[212] The insurance carrier and Rios, an injured worker, had entered into a compromise settlement agreement but the award was not paid within twenty days after the agreement had been approved by the Industrial Accident Board. Thereafter Rios sued to enforce the agreement and collect a statutory attorney's fee and a twelve percent penalty. The trial court agreed with the plaintiff and awarded the requested changes. The insurance carrier appealed contend-

205. *Id.* at 638.
206. TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (Vernon 1967).
207. 613 S.W.2d 16 (Tex. Civ. App.—Texarkana 1981, no writ).
208. *Id.* at 19.
209. *Id. See also* Twin City Fire Ins. Co. v. Foster, 537 S.W.2d 760 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).
210. 613 S.W.2d at 19.
211. TEX. REV. CIV. STAT. ANN. art. 8307, §§ 5, 5a (Vernon 1967).
212. 617 S.W.2d 798, 801 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

ing that the statutory attorney's fee and penalty could not be recovered in a suit to enforce a compromise settlement agreement since the agreement was not a "final order, ruling or decision" as required by article 8307, section 5a. The Austin court of civil appeals noted that there were authorities to support the injured worker's position[213] but held for the insurance carrier relying on an Industrial Accident Board rule that stated: "Failure to tender payment within such time shall cause the board to *immediately set such case for formal hearing for the purpose of invoking proper sanctions*."[214] The court thus indicated that only the Board, not the trial court, could award such penalties and attorney's fees.[215] The appellate court further relied on two earlier cases, *Pearce v. Texas Employers' Insurance Association*[216] and *Barnes v. Bituminous Casualty Corp.*[217], that held that a statutory cause of action for penalty and attorney's fees could not be founded on a compromise settlement agreement.[218]

Wage Rate. Despite the importance of the proper wage rate in every compensation claim, there was only one reported appellate case dealing with the issue during this past survey year. In *Gulf Insurance Co. v. Johnson*[219] there was a dispute as to whether a death claim beneficiary was entitled to rely on article 8309, section 1(3).[220] Generally, computation of a wage rate based on the "just and fair" provisions of article 8309, section 1(3) is available to a claimant only if an average weekly wage cannot be computed under the first two subsections to article 8309, section 1.[221] When neither the claimant nor any other employee in his class has worked at least 210 days of the year immediately preceeding the claimant's death, an average weekly wage rate cannot be computed under the first two subsections and wages may be determined under subsection 3.[222] In *Johnson* the deceased employee was employed as a dishwasher at a recreational youth camp. In addition to an hourly wage, his compensation included room and board and the opportunity to participate in horseback riding, fishing, canoeing and swimming activities at the camp. He had only worked thirteen to fourteen days for this particular ranch, and there was no evidence of any person who worked at least 210 days in the same or similar capacity. The appellate court, therefore, held that the evidence was sufficient to show that the decedent's wage rate could not be established by any method other

213. *Id.* at 800. *See* Pacific Employers Ins. Co. v. Brannon, 150 Tex. 441, 242 S.W.2d 185 (1951); Insurance Co. of N. America v. Escalante, 484 S.W.2d 608 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

214. 617 S.W.2d at 800. *See* Tex. Indus. Accid. Bd. Rule 061.08.00.220, 2 Tex. Reg. 4322 (1977).

215. 617 S.W.2d at 800-01.

216. 412 S.W.2d 647 (Tex. 1967).

217. 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

218. 617 S.W.2d at 801.

219. 616 S.W.2d 320 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

220. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(3) (Vernon 1967).

221. *Id.* art. 8309, § 1.

222. *See* Texas Employers' Ins. Ass'n v. Miller, 596 S.W.2d 621 (Tex. Civ. App.—Waco 1980, no writ). For a discussion of the *Miller* case, see Collins, *supra* note 40 at 283.

than by use of the "just and fair" provisions of article 8309.[223]

Occupational Disease—Notice. Article 8307, section 4a requires an injured worker to give notice of injury "within 30 days after the happening of an injury or the first distinct manifestation of an occupational disease."[224] The term "injury" as used in the Act also encompasses an occupational disease.[225] The Texas Supreme Court considered the question of what constitutes proper notice to the employer in *DeAnda v. Home Insurance Co.*[226] Porfirio DeAnda sustained a back injury occasioned by an occupational disease that had resulted from repetitious physical traumatic activity. DeAnda was working as a welder's helper when he injured his back lifting steel. He later sustained additional lifting injuries while on the job. DeAnda reported to the company nurse and went to the company doctor over a five or six month period. After each visit the company doctor sent letters to DeAnda's employer describing his condition. DeAnda filed suit and the insurance carrier defended on the ground that the employer did not have actual notice of the occupational disease within thirty days after it became disabling. In affirming the trial court's judgment in DeAnda's favor, the supreme court reiterated some of the principles governing "notice" disputes:

1. no particular form or manner of notice is required;[227]
2. "notice" can be dispensed with when the employer or insurer has actual knowledge of the injury or occupational disease;[228]
3. the "actual knowledge" need not apprise the employer of the exact time, place and extent of injury;[229] and
4. great liberality should be indulged in determining the sufficiency and scope of the notice.[230]

The supreme court relied on these principles to conclude that there was ample evidence from which the jury could have concluded that the employer had actual knowledge of DeAnda's occupational disease within thirty days of his disability.[231] The court noted that the company was on notice that DeAnda was seeing the company physician and had received medical reports from the company doctor and nurse.[232] In addition, the court stated that DeAnda had missed seventeen days of work due to his back injury.[233]

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223. 616 S.W.2d at 326.
224. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967).
225. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1982).
226. 618 S.W.2d 529 (Tex. 1980).
227. *See* Texas Employers Ins. Ass'n v. Bradshaw, 27 S.W.2d 314 (Tex. Civ. App.—San Antonio 1930, writ ref'd).
228. *See* Texas Employers' Ins. Ass'n v. Fricker, 16 S.W.2d 390 (Tex. Civ. App.—Amarillo 1929, writ ref'd).
229. *See* Texas Employers' Ins. Ass'n v. Bradshaw, 27 S.W.2d 314 (Tex. Civ. App.—San Antonio 1930, writ ref'd).
230. *See* Lewis v. American Sur. Co., 143 Tex. 286, 184 S.W.2d 137 (1944).
231. 618 S.W.2d at 533.
232. *Id.* at 534.
233. *Id.*